NO. 46717-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RAUL CASTILLO-LOPEZ,

Appellant.

BRIEF OF APPELLANT

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Assignment of Error

The trial court abused its discretion and denied the defendant counsel of his choice when it refused to consider a motion for substitution and a motion to continue based upon an unwritten Lewis County Superior Court policy of refusing all motions to substitute and continue criminal trials without consideration of the underlying facts.

Issues Pertaining to Assignment of Error

Does a trial court abuse its discretion and deny a defendant counsel of choice if it refuses to consider a motion for substitution and a motion to continue based upon an unwritten Superior Court policy of refusing all motions to substitute and continue criminal trials without consideration of the facts underlying the motion?

STATEMENT OF THE CASE

Factual History

On January 14, 2012, TS turned 12-years old. RP 53-54, 60-63.[1] At that time she lived in Salkum in Lewis County with her mother Kelly and her step-father defendant Raul Castillo-Lopez. RP 53-55. According to TS, just before she turned 12-years-old the defendant began touching her over her clothes on her inner thigh. RP 57. After she turned 12-years-old the defendant forced her to participate in penile-vaginal intercourse, anal intercourse and fellatio on up to 20 occasions. RP 60-66, 67-70. TS claimed that this contact usually occurred in her bedroom when her mother was asleep, in the bath or at work. *Id.* After about a year of abuse, TS's mother Kelly found sexually suggestive text messages on TS's cell phone TS claimed the defendant had sent to her. RP 73-77. Upon finding these messages Kelly ordered the defendant to leave the home and then took TS to the police station where she gave a statement concerning her claims of abuse. RP 72, 78-81, 199-201.

According to the defendant, after Kelly kicked him out of the house,

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[1]The record on appeal includes four volumes of continuously numbered verbatim reports of the jury trial and sentencing in this case, referred to herein as "RP [page #]." The record on appeal also includes three other volumes of verbatim reports, each beginning with page number one. They are referred to herein as "RP [date] [page #]."

he moved back to Mexico. RP 262-264. In fact, Kelly later came to disbelieve her daughter's claims against the defendant. RP 205-218. Kelly then moved out of town and gave her sister custody of TS before she left. RP 84. Both the defendant and Kelly later claimed that the defendant's move to Mexico had previously been planned in order to facilitate the defendant obtaining legal residence in the United States, and that TS had fabricated her claims against the defendant because she did not like him and because she did not want to move with them to Mexico. RP 199-204, 262-264.

The defendant was later arrested when he crossed the border back into the United States at San Diego. RP 159-161 He was then returned to Lewis County in order to stand trial. *Id.* Prior to trial the state obtained a DNA sample from the defendant for testing and comparison against a DNA sample taken from dried semen found on a blanket from TS's bed. RP 127-128, 129-133. The DNA taken from the dried semen matched the DNA sample taken from the defendant. RP 184-194. At trial the defendant denied TS's claims of sexual abuse. RP 258-259, 266-267. In addition, both the defendant and TS's mother testified that the semen must have been transferred to the blanket when they had sex on the couch with the blanket under them. RP 218, 266.

Procedural History

By information filed on 2/11/14 and amended on 6/12/14, the Lewis County Prosecutor charged the defendant with five counts of Second Degree

Rape of a Child alleging that he had engaged in sexual intercourse with his step-daughter TS on five separate occasions between January of 2013, and February of 2014. CP 1-8, 9-17. The case was eventually set for trial during the week beginning on July 7, 2014, with the defendant represented by a court-appointed attorney. RP 6/19/14 1-6. The defendant later became dissatisfied with this attorney, and his family was eventually able to raise enough funds to hire an attorney to represent him. *Id.*

On June 19, 2014, the parties appeared before The Honorable Judge Hunt of the Lewis County Superior Court with the defendant now represented by his recently retained attorney. RP 6/19/14 1-2. This attorney then moved for permission to substitute in as the defendant's attorney of record and for a continuance on the basis that he needed time to adequately prepare for trial. *Id.* Without consideration of any of the factors set out in *State v. Roth, infra,* Judge Hunt refused to consider granting a continuance to allow the defendant's retained counsel time to adequately prepare and refused to allow defendant's retained counsel to even enter the case. RP 6/19/14 4-6.

Judge Hunt based his decision on a blanket, unwritten policy of the Lewis County Superior Court judges to always deny motions to continue in order to allow newly retained counsel time to adequately prepare regardless of the underlying facts. RP 6/19/14 2-3. Judge Hunt stated the following in regards to this "unwritten" policy in response to the statements of defendant's

court-appointed attorney and retained attorney.

> MR. GROBERG [court-appointed attorney]: Your Honor, Mr. Castillo had sent a letter to the court asking for new counsel. He also since that time has retained Mr. Samuel Marsh, who is here today. He's brought a substitution/withdrawal with him, and I just thought we should put this on because we have a jury trial currently scheduled for July 7th in this matter. So that's what Mr. Castillo would like.
>
> THE COURT: The rule is you can substitute in at this late date, but he has to be ready for trial on the 7th. Trial date is not going to be continued.
>
> [PAUSE IN PROCEEDINGS]
>
> THE COURT: Yes or no?
>
> MR. MARSH [retained counsel]: Yes, we're - Your Honor, we'll go ahead and go along with the scheduled trial date. I mean, if we feel that that prejudices our case, we'll go ahead and file an appeal afterwards, I mean. You know, we'd like to continue the case to allow us enough time to look over the discovery and obtain all the witnesses and get all the evidence we need, but if you are not going to allow that, well, we have no choice.
>
> THE COURT: Yes, you do. You can not substitute in and then Mr. Groberg goes to trial, because he's done all of that work already.
>
> MR. MARSH: Well, I mean, I think the guy has a right to substitute his attorney if he wants to, so . . .
>
> THE COURT: No, he doesn't. The rule requires my - that the court allow this, and I will allow it if you're ready to go to trial on the 7th. If you're not going to be ready or you're going to say, oh, it's going to be ineffective assistance of counsel, then I'm not going to allow the substitution.

RP 6/19/14 2-3.

At this point both the defense and the prosecution moved for a

continuance on the basis that (1) the Washington State Patrol Crime Law (WSP) had yet to provide the parties with the analysis of the DNA evidence the police obtained from TS's blanket and the DNA taken from the defendant, (2) that the WSP scientist who had performed the analysis was out on maternity leave, and (3) that given these facts neither party was available to go forward on the date set. *Id.* In making this motion the state specifically represented that the complaining witness was in agreement with the continuance of the trial date. RP 6/19/14 4. The trial court refused to grant a continuance on this basis also. RP 6/19/14 4-5.

The defendant's retained attorney then made a second motion to continue the trial for two weeks to give him time to prepare. RP 6/16/14 4. Judge Hunt also denied this request. RP 6/1614 5. This exchange, which ended the hearing, went as follows:

> MR. MARSH: You're saying we can't even move this not even like two weeks?
>
> THE COURT: No. The matter is not going to be continued. I don't know how many more times I have to say this. You can substitute in, but you're saying that you're ready to go to trial on the 7th.
>
> When the person moves at this late date saying, "I don't think my attorney is doing a good job so I hired -" the one that we've provided because he's indigent, and has hired somebody now, it appears to me, and I think the record will support this, that's an effort to get the matter continued.
>
> I'm not going to do that. You have to have my permission to do

it. I'm not giving you that permission unless you say you're going to be ready to try this case the week of July 7th.

I think I've said that about six time now. Is there something that's not clear about that?

MR. MARSH: I didn't know it was going to hurt to ask you if I could just do that. I mean, I don't even have availability on the 7th or the 9th to –

THE COURT: Then you shouldn't have taken the case, should you? This case is set for trial on the week of the 7th, and it is not going to be continued. That's seven times.

MR. MARSH: Then don't grant the substitution, Your Honor.

THE COURT: Okay. I'm not.

MR. MARSH: All right.

THE COURT: Now, there's nothing else to do in this matter, so let's move on.

MR. MARSH: All right.

RP 6/19/14 5-6.

Two weeks after this hearing the parties again appeared in court, this time in front of the Honorable Judge Brosey. RP 7/3/14 1-8. At that time the defendant's retained attorney again moved to continue the trial to give him time to prepare. *Id.* Judge Brosey denied the request on the basis that it was the long-standing, unwritten "policy" of the Lewis County Superior Court to deny any continuances to allow recently retained counsel adequate time to prepare for trial. RP 7/3/14 2-3. The following gives Judge Brosey's

statements on this "policy" and his refusal to consider a continuance based upon it.

> THE COURT: We don't – we have an informal policy have had it for years in Lewis County. We do not accept substitution of counsel that's dependant upon getting a continuance of the trial date. The Court runs the Court's calendar, not the attorneys.
>
> MR. MARSH: Right.
>
> THE COURT: The case is set for trial. If you want to substitute, I don't know what Judge Hunt –
>
> MR. MARSH: Yes.
>
> THE COURT: – I don't know what Judge Hunt told you, but if you basically came before me, said I want to substitute, my response would be, fine, you can substitute, but there's the trial date. When somebody comes in and says I'll substitute in provided I can get a continuance, we don't do that. It may very well be that the case doesn't necessarily go to trial as originally set, but I can't condition appearances on getting a continuance.

RP 7/3/14 2-3.

> THE COURT: What I need to know is if we're going to be confirming? I also need to know what's going to happen with respect to Mr. Marsh, if you are going to appear or not because Mr. Castillo-Lopez as far as I'm concerned is entitled to counsel of his own choosing. If he wants to have you here Mr. Marsh, again, as far as I'm concerned Mr. Marsh can be hired, but I'm not conditioning that on a continuance of the trial date which is set for next week.
>
> MR. MARSH: I totally understand that. I apologize for not being up to speed on the rules of this Court, not really aware of that, . . .
>
> THE COURT: I understand, Mr. Marsh. As far as I'm concerned, you don't have to apologize. It has been an informal policy. There's nothing in writing, but that's just the problem is if

you start continuing cases, because somebody is changing counsel then some cases never get to trial. I need to know what's going to [happen] here.

RP 7/3/14 5-6.

MR. GROBERG: First of all, it is my understanding Mr. Marsh is not going to be subbing in unless this court has granted a continuance.

THE COURT: I will not grant a continuance, based upon substitution of counsel.

RP 7/3/14 8.

THE COURT: If Mr. Castillo-Lopez and/or his family wants to hire Mr. Marsh or anybody else to represent him, that's his prerogative. I'm not going to do anything to interfere with that. But Mr. Groberg is counsel of record for Mr. Castillo-Lopez, unless or until the Court approves the substitution, and my understanding from what I've been told is that Mr. Marsh's proposed appearance was conditioned on the idea that he would get a continuance of the trial date, which I'm not granting, . . .

RP 7/3/14 10.

Based upon this ruling the defendant went to trial on the date set represented by his court-appointed attorney. RP 1. During that trial the state called eight witnesses during its case-in-chief, including TS. RP 53, 102, 118, 146, 158, 166, 218, 226, 238. The defense then called two witnesses, after which the state called two of its original witnesses for short rebuttal. RP 197, 257, 281, 287. All of these witnesses testified to the facts set out in the preceding factual history. *See* Factual History, *supra*.

Following the presentation of evidence, the court instructed the jury

without objection and both parties presented their closing arguments. RP 291, 295-310, 311-362. The jury then retired for deliberation, during which it asked for permission to listen to the recordings of some jail calls the defendant made to his wife. RP 370-371; CP 91. The court granted the request without objection from either party, had the jury escorted into the courtroom, and played the recording. RP 370-371. The jury then retired for further deliberations. *Id.* Eventually the jury returned guilty verdicts on each count. RP 372-376; CP 92-96. The jury also found that the defendant had committed the crimes against a family or household member, that he had violated a position of trust and authority, and that he had committed the crimes as a pattern of ongoing sexual abuse of a minor over a long period of time. RP 372-376; CP 97-116.

The court later called the case for sentencing with both parties agreeing that the mandated sentence on each count was life in prison with a standard minimum mandatory time from 210 to 280 months on each count. RP 389. However, based upon the three aggravators, plus the fact that the defendant's offender score was 12 points on each count, the court sentenced the defendant to life in prison on each count with a minimum mandatory time to serve before first qualifying to appear before the Indeterminate Sentencing Review Board of 500 months on each count. CP 129-164. The Defendant thereafter filed timely notice of appeal. CP 169-204.

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED THE DEFENDANT COUNSEL OF HIS CHOICE WHEN IT REFUSED TO CONSIDER A MOTION FOR SUBSTITUTION AND A MOTION TO CONTINUE BASED UPON AN UNWRITTEN LEWIS COUNTY SUPERIOR COURT POLICY OF REFUSING ALL MOTIONS TO SUBSTITUTE AND CONTINUE CRIMINAL TRIALS WITHOUT CONSIDERATION OF THE UNDERLYING FACTS.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." *Wheat v. United States*, 486 U.S. 153, 158, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Similarly, Washington Constitution, Article 1, § 22, provides that "[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . ." *State v. Chase*, 59 Wn.App. 501, 799 P.2d 272 (1990). These constitutional rights provide a particular guarantee: that "the accused be defended by the counsel he believes to be best." *United States v. Gonzalez–Lopez*, 548 U.S. 140, 146, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). As the United States' Supreme court held in *Gonzalez-Lopez*, the denial of counsel of choice is a structural error requiring reversal and a new trial, even if counsel who represented the defendant at trial was effective. In this case the court held that the deprivation of a defendant's right to counsel of choice is

"complete" when the defendant is erroneously prevented from being

> represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice – which is the right to a particular lawyer regardless of comparative effectiveness – with the right to effective counsel – which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

Gonzalez–Lopez, 548 U.S. at 148, 126 S.Ct. 2557.

The decision whether or not to grant a continuance to allow time for retained counsel to prepare lies within the sound discretion of the trial court and will only be overturned upon proof that the trial court abused that discretion. *State v. Aguirre*, 168 Wn.2d 350, 365, 229 P.3d 669 (2010). An abuse of discretion occurs "when the trial court's decision is arbitrary or rests on untenable grounds or untenable reasons." *State v. Lawrence*, 108 Wn.App. 226, 31 P.3d 1198 (2001). It also occurs when it is based on an erroneous view of the law or when the trial court applies an incorrect legal standard. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

Traditionally, our trial courts have applied the following four part test established in *State v. Roth*, 75 Wn.App. 808, 881 P.2d 268 (1994), when determining whether or not to grant a continuance to allow newly retained counsel adequate time to prepare.

> (1) whether the court had granted previous continuances at the defendant's request; (2) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation; (3) whether available counsel is prepared to go to trial; and (4) whether the denial of the motion is likely to result in identifiable prejudice to the defendant's case of a

material or substantial nature.

State v. Price, 126 Wn.App. 617, 632, 109 P.3d 27 (2005) (citing *State v. Roth*, 75 Wn.App. at 825).

In a case from earlier this year, *State v. Hampton*, 182 Wn.App. 805, 332 P.3d 1020 (2014), Division I of the Court of Appeals recognized that the United States Supreme Court's 2006 decision in *Gonzalez–Lopez, supra.* has now invalidated the second and fourth *Roth* factors. In *Hampton*, the court noted the following concerning the second *Roth* factor:

> In light of *Gonzalez-Lopez*, the second *Roth* factor – the legitimacy of the defendant's dissatisfaction with appointed counsel – is an improper consideration when a court evaluates a defendant's request for counsel of choice. Indeed, the right "commands, not that a trial be fair, but that a particular guarantee of fairness be provided – to wit, that the accused be defended by the counsel he believes to be best." Thus, a defendant who hires an attorney whom he or she prefers – subject to qualifications recognized in Gonzalez-Lopez – retains the Sixth Amendment right to be represented by that attorney without regard to a trial court's assessment of the legitimacy of the defendant's dissatisfaction with present counsel.

State v. Hampton, 332 P.3d at 1029 (citations omitted).

In *Hampton*, the court went on to recognize that the fourth *Roth* factor suffered from the same defect as the second. The court held:

> In addition, the fourth Roth factor – whether the denial of the motion to continue to facilitate substitution of retained counsel is likely to result in identifiable prejudice to the defendant's case of a material or substantial nature – is also an improper consideration. The right to counsel of choice is not dependent on the quality of the representation being provided by present counsel. Importantly, "the purpose of the rights set forth [in the Sixth] Amendment is to ensure

> a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." Indeed, the Court in *Gonzalez–Lopez* rejected the contention "that the Sixth Amendment violation is not 'complete' unless the defendant can show that substitute counsel was ineffective within the meaning of *Strickland v. Washington*. Instead, "[w]here the right to be assisted by counsel of one's choice is wrongly denied . . . it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation." It follows that a trial court errs by searching for the likelihood of "identifiable prejudice to the defendant's case of a material or substantial nature" when evaluating a defendant's request to continue proceedings in order to substitute retained counsel of choice for present counsel.

State v. Hampton, 332 P.3d at 1029-1030 (citations omitted).

Thus, in *Hampton*, the court concluded:

> The second and fourth factors applied in *Roth* and *Price* cannot be reconciled with a defendant's right to hire and be represented by the "counsel he believes to be best." In other words, when a trial court considers a continuance requested to facilitate the substitution of a defendant's retained counsel of choice for present counsel, United States Supreme Court precedent precludes application of these two factors.

State v. Hampton, 332 P.3d at 1030 (citation omitted).

The facts in *Hampton* are instructive in determining whether or not the trial court abused its discretion in the case at bar. In *Hampton*, the state charged the defendant with third degree rape, which it amended to second degree rape upon the defendant's refusal to accept a proffered plea bargain. The case was continued once at the request of both parties. The defendant, who was in custody and represented by an appointed attorney, was eventually able to raise the funds necessary to retain his own attorney just prior to trial.

That attorney then entered a notice of appearance contingent upon the trial court's agreement to continue the trial to allow counsel time to prepare. The state objected, noting that complaining witness opposed any continuance of the trial date. After consideration of the four *Roth* factors the court denied the motion and the defendant ended up going to trial with appointed counsel. Following conviction the defendant appealed, arguing in part that the trial court had abused its discretion when it denied the motion to continue to allow retained counsel time to prepare.

In addressing appellant's argument the court of appeals first reviewed the decisions in *Roth* and *Gonzalez-Lopez* and held that the trial court had erred when it based its decision in part upon the second and fourth *Roth* factors. The court then went on to address the state's arguments that the court had properly considered and applied the first and third *Roth* factors. The Court of Appeals disagreed with this argument, noting that (1) the one continuance had been granted at the request of both parties, and (2) the trial court had failed in enquire on how much time retained counsel needed to prepare. The court then reversed, holding as follows:

> Here, following *Roth*, the trial court applied a method of analysis precluded by controlling United States Supreme Court precedent. Thus, we conclude that the trial court erred by denying Hampton's motion. Because the deprivation of counsel of choice constitutes "structural error," Hampton is entitled to a new trial.

State v. Hampton, 332 P.3d at 1032 (2014).

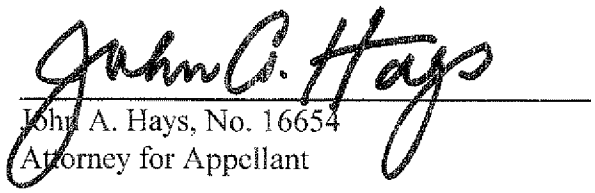
In *Hampton* the trial court at least considered the *Roth* factors, including the still valid first and third, even though the court failed to correctly apply them by enquiring how long retained counsel needed to prepare. In the case at bar the trial court did not even consider any of the *Roth* factors, much less enquire into the time counsel needed to prepare. Rather, both judges who addressed the defendant's motion to continue refused to consider any relevant facts at all. These facts were: (1) that retained counsel was only asking for two weeks to prepare, (2) that the DNA analysis was not yet available to both counsel, (3) that a critical state's witness was not available, and (4) that the complaining witness did not oppose the continuance. By refusing to consider any facts at all in order to implement an unwritten policy that precluded meaningful consideration of either a state or defendant's motion to continue a trial date the trial court abused its discretion and denied the defendant his right under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, to counsel of his own choice. Since this is a structural error, this court should reverse and remand for a new trial.

CONCLUSION

The trial court abused its discretion when it refused to consider the defendant's motion to continue his trial date in order to allow retained counsel to adequately prepare for trial. As a result, this court should reverse and remand for a new trial.

DATED this 30th day of December, 2014.

Respectfully submitted,



John A. Hays, No. 16654
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APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION,
SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **Raul Castillo-Lopez,** **Appellant.**	**NO. 46717-8-II** **AFFIRMATION OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On this day, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 30th day of December, 2014, at Longview, WA.

Donna Baker

HAYS LAW OFFICE

December 30, 2014 - 10:46 AM

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